Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

NICHOLAS BUTTS, JR.,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the State's calling a co-defendant witness whom they knew would refuse to testify on the basis of his Fifth Amendment privilege violate Petitioner's Sixth Amendment right to confrontation and cross-examination of witnesses, and deny him a fair trial?

2. Was evidence presented against Petitioner sufficient to provide him with the due process of law guaranteed by the Fifth Amendment to the United States Constitution?

3. Did Petitioner's trial counsel's failure to move for mistrial after the State called a co-defendant witness whom they knew would refuse to testify on the basis of his Fifth Amendment privilege, coupled with counsel's statement that the testimony of John Hughes would be cumulative, deprive Petitioner of effective assistance of counsel?

4. Did the exclusion of the testimony of John Hughes, and the trial court's comment on that evidence, coupled with the State's calling of a co-defendant witness whom they knew would refuse to testify based on his Fifth Amendment privilege deny Petitioner a trial in accordance with traditional and fundamental standard of Due Process?

PARTIES TO THE PROCEEDINGS

Nicholas Butts, Jr.,
Petitioner

The State of Texas,
Respondent

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Nicholas Butts, Jr., respectfully requests that a writ of certiorari be issued to review the judgments of the Court of Criminal Appeals of Texas, and the judgment of the Court of Appeals for the Seventh District of Texas, at Austin.

OPINIONS BELOW

The judgment of the Court of Criminal Appeals is unpublished, but attached hereto, at Appendix, page 16. The opinion of the Court of Appeals for the Seventh District of Texas, at Austin, is unpublished, but attached hereto, at Appendix, page 1.

STATEMENT OF THE JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered on May 9, 2001. A Motion for Rehearing was filed May 29, 2001, and was denied by the Court of Criminal Appeals on June 13, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant parts:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

The Sixth Amendment to the United States Constitution provides, in relevant parts:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

The issues presented here concern the denial of due process and violation of the Fifth and Sixth Amendment rights of Petitioner.

A. Statement of Facts

Petitioner, Nicholas Butts, Jr., was employed as a salesperson at the parts counter of Stubbs Cycles, a retailer of motorcycles and motorcycle accessories in Houston, Harris County, Texas. On November 26, 1999, Butts was involved in two "internal transactions" for motorcycle accessories, including a helmet, some shields and a leather jacket. All of the items were Japanese based products, but were associated with the VIN numbers

assigned to two Harley Davidson, American made, motorcycles.

"Internal transactions" at Stubbs Cycles referred to sales of parts or accessories in conjunction with the sale of a motorcycle, without money actually changing hands at the parts counter.

The internal transactions at issue here were scrutinized by the managers at Stubbs due to the association of Japanese products with the Harley Davidson motorcycles, and due to the lack of a sales manager's authorization signature on the invoice. According to the State's witnesses, it was unusual for Japanese accessories to be sold with a Harley Davidson, and it was the policy and procedure at the dealership to require the signature of the sales manager on internal transactions. The State's witnesses testified that in order to accomplish an internal transaction, the salesperson was required to go to the parts counter, indicate to the parts salesperson which parts were to be included with the motorcycle sale, given the VIN number of the motorcycle to the salesperson, and have the parts person pull the needed parts or accessories after the sales manager's signature had been obtained. Witnesses for the State agreed, however, that it probably did happen that parts were billed to motorcycles without manager's approval, and that sometimes there was no authorization and parts would still go to legitimate units.

It was determined that the items in the transactions here were stolen only because the customers who purchased the bikes referenced by VIN number in these transactions had not ordered or received the items. The videotape of the transactions showed that the Petitioner

took the parts order and VIN number from a salesman, Neil McNeil, bagged the items and gave them to McNeil, Michael Turner, manager of Stubbs, testified that he felt that Butts and McNeil had acted together to accomplish the theft only because he felt neither could have done it alone.

Petitioner was fired for not following the company policy requiring a sales manager signature prior to release of parts to a salesperson.

Defense witnesses testified that the company policy requiring a signature was routinely disregarded, and that the salesmen at Stubbs merely went to the parts counter, gave the parts person the part number and the VIN number and the part would be ordered.

There was no evidence that Petitioner received any of the items taken by Neil McNeil, or that he received any profit from them. No association between Neil McNeil and Petitioner was shown, except that they worked for the same employer, and worked on this single transaction together.

B. Proceedings Below

On April 10, 2000, Petitioner Nicholas Butts, Jr. appeared for trial before the Honorable Michael R. Fields, in County Criminal Court at Law Number 14, as a defendant in Cause Number 0980483, in which the State of Texas alleged that he had committed the offense of theft of over five hundred and under one thousand five hundred dollars.

Following a trial by jury, Petitioner was found guilty of the offense of theft. Having been found guilty, the court sentenced Petitioner to 270 days confinement in the Harris County Jail.

Petitioner filed a timely Notice of Appeal.

Petitioner's conviction was affirmed by the Court of Appeals for the Seventh District of Texas; and the Court of Criminal Appeals of Texas refused Petitioner's Petition for Discretionary Review, and Motion for Rehearing.

Specifically, with regard to the Questions Presented here, Petitioner raised Question 1 by his timely objection at trial, and this third issue on appeal, which the Court of Appeals answered on page 6 of its opinion.

Petitioner raised Question 2 by his motion for judgment of acquittal at trial, and as his first and second appellate issues, which were answered on page 4 of the opinion of the Court of Appeals for the Seventh District.

Petitioner raises Question 3 for the first time here, based upon the interpretation and holding of the Court of Appeals for the Seventh District, in response to Petitioner's third, fourth and fifth issues, which the Court of Appeals answers on pages 7 and 9.

Petitioner raised Question 4 as an issue whose specifics are contained in the other Questions Presented, but which, taken as a whole, deprived Petitioner of the fair trial and due process guaranteed by the United States Constitution.

REASONS FOR GRANTING THE WRIT

I.

The Petition should be granted because the State's calling a co-defendant witness whom they knew would refuse to testify on the basis on his Fifth Amendment privilege violated Petitioner's Sixth Amendment right to confrontation and cross-examination of witnesses, and denied him a fair trial.

As there is a split among the Circuits on this issue, the grant of certiorari is warranted. *Lindsey v. United States*, 484 U.S. 934, 104 S.Ct. 310, 98 L.Ed.2d 268 (1987) (White, J. and Brennan, J. *dissenting*).

There are few subjects, perhaps, upon which [federal courts] have been more nearly unanimous than in their expression of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial, which is this country's constitutional goal. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065 (1965). The trial court also has a duty, however, to protect the Fifth Amendment rights of witnesses. *Alford v. United States*, 282 U.S. 687, 694, 51 S.Ct. 218, 220 (1931).

Calling a witness in circumstances where it is known that the witness will refuse to testify based upon his Fifth Amendment privilege, and where no useful purpose would be served, was error, notwithstanding that a curative instruction was given. *United States v. King*, 461 F.2d 53, 57 and n.4 (8th Cir. 1972). The calling of a witness before the jury after he had indicated that he would decline to testify was disapproved. *United States v. Roselli*, 432 F.2d 879 (9th Cir. 1970). *See also United States v. Ritz*, 548 F.2d 510 (5th Cir. 1977). This practice is so imbued with the potential for unfair prejudice that a trial judge

should closely scrutinize any such request; although in *United States v. Lewis*, 816 F.2d 863 (6th Cir. 1987), the court held that the trial court did not commit reversible error when it permitted the witness to testify and gave a cautionary instruction.

Texas courts have ruled that a trial court commits error in permitting the State to call a co-defendant witness to the stand and require him to claim his privilege against self-incrimination and refuse to testify in the presence of the jury. Such refusal is prejudicial because it can be used as an incriminating fact against the Petitioner. *Allen v. State*, 461 S.W.2d 622 (Tex.Crim.App. 1971); *Washburn v. State*, 299 S.W.2d 706 (Tex.Crim.App. 1957). Calling such a witness and having him decline to testify, in the presence of the jury, constitutes error as it can be offered for no other purpose than to compel or invite the witness, who is then under indictment for the same offense, to refuse to testify in order to use this as an incriminating fact against the Petitioner. *Washburn, supra* at 708, citing *McClure v. State*, 95 Tex.Cr.R. 53, 251 S.W.2d 1099, 1102. If the State's purpose in putting the witness on the stand is to compel or invite his refusal to testify, in order to use this as an incriminating fact against Petitioner, the state is guilty of an injustice. *McClure, supra.*

Prior to trial, Petitioner objected to the State calling co-defendant Neil McNeil to the witness stand in the presence of the jury, because Petitioner's counsel had been informed that McNeil would assert his privilege against self-incrimination, and calling McNeil would be prejudicial to Petitioner. McNeil's Motion to Quash subpoena informed the court that McNeil would assert his privilege against self-incrimination and refuse to testify if

called. The Court's ruling on Petitioner's objection was that the objection would be addressed when the trial reached the point that McNeil would be called. The trial court indicated that it could not prohibit the State from calling the witness. A district court, however, has the discretion to prevent a party from calling a witness solely to have him or her invoke the privilege against self-incrimination in front of the jury. *See United States v. George*, 778 F.2d 556, 562 (10th Cir. 1985); *United States v. Vandetti*, 623 F.2d 1147-48 (6th Cir. 1980); *United States v. Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir.), *cert. denied sub nom., Fierro-Soza v. United States*, 439 U.S. 1005, 99 S.Ct. 618, 58 L.Ed.2d 682 (1978); *United States v. LaCouturre*, 495 F.2d 1237 (5th Cir. 1974).

As their final witness, in the presence of the jury, the State called Neil McNeil. Petitioner approached the Bench and informed the Court again that McNeil intended to assert the privilege against self-incrimination. The Court excused the jury to see what McNeil would say. Following voir dire of McNeil, outside the presence of the jury, in which McNeil did assert the privilege, the State decided not to question McNeil.

After calling the jury back to the courtroom, the court commented, "Ladies and gentlemen, the State has called a witness. That witness will not be testifying." The court gave no instruction to disregard the fact that McNeil had been called, but would not be testifying, thus leaving the jury to draw its own conclusions.

At the time McNeil was called, the jury already knew that McNeil was involved in the transactions at issue, and that he also had been charged with theft for his part in the transactions.

Having been repeatedly informed by Petitioner and by counsel for McNeil that McNeil would invoke his Fifth Amendment privilege, the State's calling of McNeil, in the presence of the jury, could be offered for no other purpose than to compel or invite McNeil to refuse to testify in order to use it as an incriminating fact against Petitioner. The State's action was prejudicial to Petitioner, violating his Sixth Amendment right to confrontation, and depriving him of his liberty without due process, due to the inferences likely drawn by the jury, which added critical weight to the government's case in a form that was not subject to cross-examination. *See United States v. Watson*, 591 F.2d 1058, 1062 (5th Cir.), *cert. denied*, 441 U.S. 965, 99 S.Ct. 2414, 60 L.Ed. 1070 (1979) (citing *Namet v. United States*, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963).

Likewise, having been repeatedly informed by Petitioner and by counsel for McNeil that McNeil would invoke his Fifth Amendment privilege, and trial court violated Petitioner's Sixth Amendment and Due Process rights by permitting the State to call the witness to the stand in the presence of the jury.

II.

The Petition should be granted because the evidence presented against Petitioner was insufficient to provide him with the due process of law guaranteed by the Fifth Amendment to the United States Constitution.

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . . be

deprived of life, liberty, or property, without due process of law. . . . "

When the sufficiency of the evidence is challenged on appeal, the Court reviews the evidence and all the reasonable inferences which flow therefrom in the light most favorable to the verdict. *United States v. Scott*, 159 F.3d 916, 920 (5th Cir. 1998). The conviction must be affirmed if any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Petitioner here was found guilty of the offense of theft. A person commits the offense of theft if he unlawfully appropriates property with intent to deprive the owner of property. Appropriation of property is unlawful if it is without the owner's effective consent. Tex.Pen.C. § 31.03.

The elements constitution an offense under § 31.03 are: a person, with intent to deprive the owner of property, unlawfully appropriates that property, without the effective consent of the owner. *Thomason v. State*, 892 S.W.2d 8, 10 (Tex.Crim.App. 1994).

The evidence introduced at trial failed to establish, beyond a reasonable doubt, that Petitioner appropriated the property of Stubbs Cycles without the effective consent of the owner, because Petitioner merely followed the established practice of transferring parts and accessories to a "major unit" (motorcycle) sale, in an "internal transaction", based on the request of the salesman.

The evidence introduced at trial established that Petitioner, Nicholas Butts, Jr., was employed as a salesperson at the parts counter of Stubbs Cycles, a retailer of motorcycles and motorcycle accessories in Houston, Harris

County, Texas. On November 26, 1999, Butts was involved in two "internal transactions" for motorcycle accessories, including a helmet, some shields and a leather jacket. All of the items were Japanese based products, but were associated with the VIN numbers assigned to two Harley Davidson, American made motorcycles.

"Internal transactions" at Stubbs Cycles referred to sales of parts or accessories in conjunction with the sale of a major unit, a motorcycle, without money actually changing hands at the parts counter.

The internal transactions at issue here were scrutinized by the managers at Stubbs due to the association of Japanese products with the Harley Davidson motorcycles, and due to the lack of a sales manager's authorization signature on the invoice. According to witness, Tommy Brewer, it was unusual for Japanese accessories to be sold with a Harley Davidson, and it was the policy and procedure at the dealership to require the signature of the sales manager on internal transactions. Brewer, Japanese parts manager at Stubbs, testified that in order to accomplish an internal transaction, the salesperson was required to go to the parts counter, indicate to the parts salesperson which parts were to be included with the motorcycle sale, give the VIN number of the motorcycle to the salesperson, and have the parts person pull the needed parts or accessories, after the sales manager's signature had been obtained.

Joel Morris, parts manager at Stubbs, testified, however, that it probably did happen that parts were billed to

motorcycles without manager's approval, and that sometimes there was no authorization and parts were going to legitimate units.

Morris also testified that although it was unusual for Japanese accessories to be associated with the sale of a Harley Davidson, a person could use any of the items listed in the internal transactions at issue here on any bike.

It was determined here that the items in the transactions here were stolen because the customers who purchased the bikes referenced by VIN number in these transactions had not ordered or received the items. Nicholas Butts was not fired for theft however, as parts manager, Joel Morris, testified that Petitioner was fired for not following the company policy requiring a sales manager signature prior to release of parts to a salesperson.

The videotape of the transactions showed that the Petitioner merely took the parts order and VIN number from a salesman, Neil McNeil, bagged the items and gave them to McNeil. Upon viewing the videotape of this transaction, witness Staci Shott, who had also worked behind the parts counter at Stubbs, testified that Nicholas Butts had handled the transaction in a completely normal manner for a parts person. She further testified that, as a parts person, she would not have the sales authorized by a sales manager.

Scott Babbitt, a former salesman at Stubbs, testified that it was common practice for a salesman who needed a part or accessory in conjunction with the sale of motorcycle to go to the parts counter, look up a parts number,

give the part number and the last six digits of the VIN number to the parts person, and the parts person would order the part or have it installed.

Staci Shott also testified that there was no company policy requiring a signature before the date of the internal transactions, and that it was a week later that the policies and procedures changed to require managers' signatures on sales attached to a major unit.

John Hughes, whose testimony was excluded by the trial court as being cumulative, would have testified that he was familiar with all aspects of how the parts counter worked, and that almost all of the time invoices generated from the parts counter were never countersigned by a sales manager. He would have testified further, as presented to the court in an offer of proof, that when he ordered parts, he would give a six-digit VIN number and get the part, without the signature of a sales manager.

There was no evidence that Petitioner appropriated any item from Stubbs Cycles without effective consent of the owner. Evidence introduced at trial failed to show that Butts ever received any of the items taken by Neil McNeil, or that he received any profit from them. No association between Neil McNeil and Petitioner was shown, except that they worked for the same employer, and that Nicholas Butts was merely doing his job in delivering the listed accessories to salesman Neil McNeil, according to the common practice.

As there is reasonable doubt that Petitioner, doing his job according to accepted practice, appropriated property from Stubbs Cycles without the effective consent of the

owner, no rational jury could find that Nicholas Butts, Jr. was guilty of the offense of theft.

III.

The Petition should be granted because Petitioner's trial counsel's failure to move for mistrial after the State called a co-defendant witness whom they knew would refuse to testify on the basis of his Fifth Amendment privilege, coupled with counsel's statement that the testimony of John Hughes would be cumulative, deprived Petitioner of effective assistance of counsel.

In order to prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's assistance was deficient, and that the deficiency prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d (1984). In order to satisfy the prejudice prong, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and that counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. *See Lockhart v. Fretwell*, 506 U.S. 364, 122 L.Ed.2d 180, 113 S.Ct. 838 (1993).

Counsel was deficient here in two critical areas.

1) At the end of the first and only day of testimony, at approximately 5:00 p.m., Petitioner called witness John Hughes. Without any objection from the State, the court began to question whether Hughes' testimony was going to differ from the testimony of the other two defense witnesses. When informed that this witness would testify what the policy was regarding internal transactions, the

court offered the comment that the witness was a waste of time, and that he could not testify. Petitioner objected to the court's comment, but admitted to the court that his witness would testify to the same facts as his other witnesses, his longer experience would have added weight to the testimony of the other witnesses, and balanced the defense witnesses with those offered by the State. Petitioner's counsel failed to make that argument, and the Texas Court of Appeals concluded that, by Petitioner's own admission, the evidence was cumulative.

The court then ordered the jury taken out, and proceeded to voir dire the witness, without any participation by the State, who had never raised an objection to the testimony, deciding ultimately that the witness' testimony was inadmissible because it would be cumulative, and because the jury's time was being unnecessarily monopolized.

Later, while the jury was deliberating, Petitioner made a Bill of Exception regarding the testimony of Hughes. Petitioner proffered that John Hughes would have testified that he was familiar with the way the parts counter worked, due to his two years of experience of installing accessories on new bikes, and that the invoice generated from the parts counter almost all the time was never countersigned by a manager, as the managers had testified. He would have testified further that when he ordered parts, he would give the parts counter the VIN number, and that he would get the part and install it, and that he saw the invoices and they were not countersigned.

The court remained of the opinion that the information was cumulative, and that it had been testified to over and over and over again, and to allow the cumulative testimony at that time of the day, or at any hour of the day, would have amounted to nothing more than a waste of the jury's time, which the rules say the court is supposed to prevent.

The court's *sua sponte* exclusion of the testimony of John Hughes deprived Petitioner of his right to present witnesses on his behalf as guaranteed by the Sixth Amendment to the United States Constitution, Article I, Section 10 of the Texas Constitution, and Article 1.05 of the Texas Code of Criminal Procedure. As a Stubbs employee who ordered parts from the parts counter by way of internal transactions, and installed the parts on major units, Hughes would have been able to present testimony as a two year employee knowledgeable of the practices of the parts counter from a different perspective than Staci Shott, a parts person, or Scott Babbitt, a salesman at Stubbs. Considering that Petitioner had to overcome the testimony of three managers from Stubbs which differed considerably from the testimony of Shott and Babbitt, who were relatively short time employees of Stubbs, Petitioner's counsel was deficient in failing to show the trial court that the testimony to be elicited was crucial to the defense.

Compounding counsel's error, the trial court's ruling eliminated one third of Petitioner's witnesses, merely because it was 5:00 p.m., and added to its error by commenting, before the jury, that Hughes' testimony would be a waste of time, violating the admonition of § 38.05 of

the Texas Code of Criminal Procedure against commenting on the weight of the evidence.

Petitioner's counsel was deficient in his admission that the testimony of John Hughes was cumulative, allowing the trial court to block significant testimony.

2) Arguably more important, Petitioner's counsel was deficient in failing to move for mistrial after the State had called a witness whom they knew would refuse to testify on the basis of his Fifth Amendment privilege.

As the Court of Appeals for the Seventh District of Texas noted, in order to preserve error in cases of prosecutorial misconduct, the defendant must 1) make a timely and specific objection; 2) request an instruction that the jury disregarded the matter improperly placed before the jury; and 3) move for mistrial. *Penry v. State*, 903 S.W. 2d 715, 764 (Tex.Crim.App. 1995).

Here, Petitioner's counsel made a timely and specific objection, "I object to the prosecutor's calling [the co-defendant] as a witness in front of the jury. Her calling a . . . co-defendant who will take the Fifth Amendment is . . . a comment on the co-defendant's Fifth Amendment right, which is improper." Counsel then objected to any instruction regarding the co-defendant's failure to testify, and failed to move for mistrial.

The Texas Court of Appeals decided that, as Petitioner had failed to request a mistrial, there was no error preserved, because Petitioner got all the relief he requested.

Counsel was ineffective in his failure to move for mistrial and preserve error. This deficiency, combined with counsel's failure to show the trial court that his third

witness was not cumulative, prejudiced Petitioner by depriving Petitioner of a significant witness, and by failing to preserve the error of the State calling a witness whom it knew would take the Fifth. His deficiencies prejudiced Petitioner and deprived him of the right to effective assistance of counsel as guaranteed by the Sixth Amendment.

IV.

The Petition should be granted because the exclusion of the testimony of John Hughes, and the trial court's comment on that evidence, coupled with the State's calling of a defendant witness whom they knew would refuse to testify based on his Fifth Amendment privilege, and the ineffective assistance of his trial counsel, denied Petitioner a trial in accordance with traditional and fundamental standards of Due Process.

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The right to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black, writing for the Court in *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948), identified these rights as among the minimum essentials of a fair trial:

> "A person's right to a reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

See also Morrissey v. Brewer, 408 U.S. 471, 488, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). These elements are all implicated in this case. *See Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1972).

Petitioner will not reiterate the facts and argument surrounding the State's calling of a witness whom Petitioner was denied the right to confront and cross-examine, nor the lack of effectiveness of his counsel, or the court's denial of his right to present a witness in his defense, as those issues are treated above.

Separately, each of the issues above, deprived Petitioner of the rights guaranteed to him in the Fifth and Sixth Amendments. Taken together, however, the errors, denied Petitioner a trial in accordance with traditional and fundamental standards of Due Process.

CONCLUSION

This case presents questions of exceptional importance, considering whether a defendant in a criminal trial for a misdemeanor was denied his constitutionally guaranteed rights to a fair trial.

Accordingly, Petitioner Nicholas Butts, Jr. respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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NO. 07-00-0290-CR

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT OF TEXAS

AT AMARILLO

PANEL D

JANUARY 10, 2001

NICHOLAS BUTTS,

Appellant

V.

THE STATE OF TEXAS,

Appellee

FROM THE COUNTY CRIMINAL COURT AT LAW NO. 14 OF HARRIS COUNTY;

NO 0980483; HON. MICHAEL R. FIELDS, PRESIDING

Before BOYD, C.J., and QUINN and REAVIS, JJ.

Nicholas Butts, appellant, appeals his conviction of misdemeanor theft. Through six issues, appellant claims that 1) the evidence was legally and factually insufficient to support his conviction, 2) prosecutorial misconduct occurred when the prosecutor called the co-defendant as a witness knowing he would refuse to testify pursuant to the Fifth Amendment and then improperly commenting on appellant's failure to testify, and 3) the trial court erred by disallowing the testimony of a defense witness

and, when excluding said testimony, the court improperly commented on the weight of the evidence. We affirm.

Background

Because appellant has challenged the sufficiency of the evidence, we will set forth the relevant facts adduced at trial. Appellant was employed by Stubbs Cycles (Stubbs), a motorcycle dealership that sells Harley Davidson (Harley) and Japanese brand motorcycles. Michael Turner (Turner), Stubbs' business and operations manager, was the complaining witness on Stubbs' behalf and testified at trial concerning a theft that was perpetrated upon the business by appellant. Appellant was employed as a parts salesman at the time of the incident. Stubbs had in place a procedure for selling parts and accessories when a customer purchased a new motorcycle and wished to purchase additional merchandise. These additional purchases were referred to as internal transactions or sales to "major units" (referring to the motorcycle).

When a customer purchased a motorcycle and then also wanted a part or accessory such as a helmet, jacket or some other item, the motorcycle sales person would request the merchandise from a parts sales person at the parts counter. The motorcycle sales person would also give the vehicle identification number (VIN) of the motorcycle for the purpose of "attaching" the items to the correct motorcycle. The parts sales person would then enter the information into the computer and print an invoice. Then, according to Turner, the sales person would get the approval of the transaction by having a sales manager for either the parts department or the

motorcycle sales department to initial the invoice generated by the transaction. The merchandise would then be included in the sale of the motorcycle and, if the motorcycle was financed, the merchandise would be paid for through the customer's monthly payment. In other words, money never exchanged hands in an internal transaction and the merchandise was charged to the "major unit" (the motorcycle). Furthermore, the merchandise was placed with the motorcycle until the customer picked both it and the motorcycle up from the store.

On or about November 26, 1999, at around 6:00 p.m., appellant made two internal transactions within a few minutes of each other. The subject merchandise included two helmet shields, a helmet and a jacket. All items were made for use with Japanese motorcycles. The next morning appellant's immediate supervisor noticed the two transactions and immediately thought they were strange because the invoices did not contain approval from a sales manager. Furthermore, the two VINs used for the transactions belonged to two Harley motorcycles. Appellant's supervisor took the invoices to the parts manager to see if he had any knowledge of the transactions. The parts manager testified that he did not. Finally, the invoices were brought to the attention of Turner who questioned appellant regarding the sales. Initially, Appellant stated that he did not remember any of the details surrounding the transactions (even though they were two of only three transactions made within a two hour period the night before) because he was very busy during the relevant time period.

Turner began an investigation regarding the invoices and, as part of the investigation, he reviewed a videotape

from a camera poised at the parts counter. In the video, appellant is seen entering the two suspect transactions in the computer and handing the items already bagged to another employee, Neill McNeill (McNeill). McNeill then took the items and walked away from the counter. The investigation further revealed that the two VINs used were assigned to two motorcycles that were sold the week before and that neither the sales persons of those motorcycles nor the purchasers ordered or received the subject merchandise. Turner testified that, after learning these details, he confronted appellant again and that appellant became nervous and then angry. Appellant was then fired for failure to follow procedure. Subsequently, appellant was charged with theft and convicted of same by a jury. With the foregoing said, we now address appellant's issues on appeal.

Issues One and Two: Sufficiency of the Evidence

In his first two issues, appellant alleges that the jury's verdict lacks legally and factually sufficient evidentiary support. We disagree and overrule both issues.

1. Standard of Review

The standards of review applicable to claims of legal and factual sufficiency are well-settled and do not bear repeating. It is sufficient to cite the parties to *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000) and *King v. State*, 895 S.W.2d 701 (Tex. Crim. App. 1995) for an explanation of same.

2. *Application of Standard*

Appellant argues that the State failed to prove theft because the evidence presented only showed that appellant made two internal transactions, not that he committed theft. In perusing the record, we find that evidence exists from which the following could reasonably be found or inferred: 1) appellant made two transactions within minutes of each other which was unusual for those types of transactions; 2) appellant and McNeill were shown on the videotape making the suspicious transactions, with McNeill walking off with the bagged merchandise; 3) in an internal transaction, the merchandise is rarely bagged and the motorcycle salesman rarely takes the merchandise with him; 4) merchandise sold in an internal transaction is placed or becomes "attached" to the motorcycle until the customer picks it up; 5) appellant failed to get a supervisor to approve the sales; 6) the merchandise was made for use with a Japanese motorcycle but was sold to a Harley VIN; 7) no motorcycle salesmen ever ordered or received the merchandise, nor did a customer; 8) when initially questioned, appellant denied knowledge of the transactions but when questioned again he became nervous and then angry; 9) the two transactions were made minutes after appellant's supervisor left for the day; 10) Turner testified that he had the greater right to possess the merchandise; 11) Turner testified that the value of the merchandise taken was between $500 and $1500, and 12) the jury was charged on the law of parties. From this, a jury could conclude beyond reasonable doubt that appellant committed a Class A misdemeanor theft. See TEX. PEN. CODE ANN. § 31.03 (Vernon Supp. 2000) (stating the elements

and punishment range for theft). Accordingly, the verdict is supported by legally sufficient evidence.

Admittedly, the evidence was not free of contradiction. For instance, appellant presented two witnesses who were prior employees of Stubbs. Although both were employed for a short period of time, they both testified about the policies and procedures, or the lack thereof, implemented by Stubbs. Staci Shott (Shott) testified that she was a parts sales person and that she rarely received manager approval or obtained a manager's initials on merchandise invoices. Moreover, Shott testified that there was no procedure in place regarding this matter until after this incident. Another ex-employee, Scott Babbitt (Babbitt), testified that he was a motorcycle sales person at the time the incident occurred. He testified that, because of the competitive nature of motorcycle sales at Stubbs, motorcycle sales persons at Stubbs would generally follow through with a sale until its completion, even if this meant going to the parts counter and obtaining additional merchandise that had been requested by the customer. Thus, Babbitt surmised that the fact that McNeill waited on the bagged merchandise was not so strange because motorcycle sales personnel had to protect their customers or another sales person would take them away. Therefore, the sales persons had to follow through on the sale until completed. Yet, we cannot say that these circumstances and the other evidence of record rendered the verdict clearly erroneous or manifestly unjust. They created issues of fact for the jury to decide, therefore, the verdict does not lack factually sufficient support.

In appellant's third issue, he contends that the prosecutor acted improperly when she called the co-defendant to the witness stand with the knowledge that he would not testify pursuant to the Fifth Amendment. In order to preserve error in cases of prosecutorial misconduct, the defendant must 1) make a timely and specific objection; 2) request an instruction that the jury disregard the matter improperly placed before the jury; and 3) move for a mistrial. *Penry v. State*, 903 S.W.2d 715, 764 (Tex. Crim. App. 1995) *citing Cook v. State*, 858 S.W.2d 467, 473 (Tex. Crim. App. 1993).

During a pre-trial hearing in the present case, defense counsel made the following objection: "I object to the prosecutor's calling [the co-defendant] as a witness in front of the jury. Her calling a . . . co-defendant who will take the Fifth Amendment is . . . a comment on . . . the Co-Defendant's Fifth Amendment right, which is improper." The court agreed but further stated that it could not control the State's decision to call witnesses and it had no knowledge of whether or not the co-defendant would testify. At the time of trial, counsel objected again when the State called the co-defendant to the stand. This time, counsel argued that the State should not be permitted to call the co-defendant since he was going to take the Fifth. The trial court excused the jury and the State was permitted to begin questioning the witness. In response to the State's first question, the co-defendant stated that, upon the advice of his attorney, he would take the Fifth. The trial court asked the co-defendant if he was planning to answer the same to all questions and he answered in the affirmative. The trial court then excused him before re-seating the jury. The State

requested an instruction regarding "the circumstances" surrounding the fact that the co-defendant "was called to the stand," but was not allowed to testify. However, defense counsel objected to this request, thus, no instruction was given. The State then rested. No further objections or requests were made by appellant regarding the co-defendant. Because appellant failed to go further and request a mistrial, he was given all of the relief he requested. That is, he objected to the State calling the co-defendant to the witness stand in order for him to invoke his Fifth Amendment right in front of the jury and the trial court sustained the objection. Thus, there was no error. *White v. State*, 934 S.W.2d 895 (Tex. App. – Fort Worth 1996 no pet.). Therefore, we overrule appellant's third issue.

In his fourth and fifth issues, appellant contends that the trial court erred by excluding testimony from a defense witness and that the comment made by the trial court regarding the witness's testimony was an improper comment on the weight of the evidence. We disagree.

In reviewing the trial court's decision to exclude evidence, we reverse only if the trial court abused its discretion. *Mozon v. State*, 991 S.W.2d 841, 846-47 (Tex. Crim. App. 1999); *Holloway v. State*, 751 S.W.2d 866, 870 (Tex. Crim. App. 1988); *Wofford v. State*, 903 S.W.2d 796, 799 (Tex. App. – Dallas 1995, pet. ref'd). A trial court abuses its discretion when its "decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992) *cert. denied*, 509 U.S. 926, 113 S.Ct. 3046, 125 L.Ed.2d 731 (1993); *Wofford*, 903 S.W.2d at 799. A trial court's refusal to admit evidence is reversible

only if the evidence is relevant and its exclusion harmed the accused. *Canto-Deport v. State*, 751 S.W.2d 698, 700 (Tex. App. – Houston [1st Dist.] 1988, pet. ref'd); *see Bird v. State*, 692 S.W.2d 65, 73 (Tex. Crim. App. 1985), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1238, 89 L.Ed.2d 346 (1986). The test for determining this harm is whether there is a reasonable probability that the absence of that evidence contributed to the conviction or punishment. *Canto-Deport*, 751 S.W.2d at 700; *see Alexander v. State*, 740 S.W.2d 749, 765 (Tex. Crim. App. 1987).

Furthermore, we are to consider the facts and circumstances of each case that involves the trial court's refusal to admit evidence. *Canto-Deport*, 751 S.W.2d at 700. In regards to cumulative testimony, it is within the trial court's discretion to refuse to allow such testimony. *Blalock v. State*, 728 S.W.2d 135, 137 (Tex. App. – Houston [14th Dist.] 1987, pet. ref'd). Furthermore, if the import of the excluded evidence is conveyed to the trier of fact through other evidence, no error is shown. *Id.; See Easterling v. State*, 710 S.W.2d 569, 574 (Tex. Crim. App. 1986); *Johnson v. State*, 583 S.W.2d 399, 404 (Tex. Crim. App. 1979).

Here, appellant's fourth and fifth issues concern the excluded testimony of John Hughes (Hughes). After calling Hughes to testify, the trial court asked the defense counsel whether the witness was going to testify to something other than that addressed by the prior two defense witnesses. Defense counsel stated that Hughes's testimony would be regarding the same subject matter of the store's policies. The trial court disallowed Hughes's testimony, however, he was allowed to answer questions on a voir dire/bill of exception type offer of evidence. The

answers pertained to whether or not Stubbs had policies and procedures in place which required manager approval on all internal transactions. We note that Hughes's testimony was the same as Shott's and Babbitt's and was cumulative of their testimony. On appeal, appellant argues that because Hughes had been employed by Stubbs longer than the other two defense witnesses, he would have been more credible with the jury. Appellant did not urge this to the trial court, but rather advised the trial court that Hughes's testimony would be the same as the other two defense witnesses. Thus, by his own admission, the evidence was cumulative.

Appellant further contends that the trial court's comments, while disallowing Hughes's testimony, were a comment on the weight of the evidence. The specific comment complained of involved the statement that calling Hughes "would be a waste of time." Thus, according to appellant, the trial court violated article 38.05 of the Texas Code of Criminal Procedure. We disagree.

Article 38.05 states the following: "In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case." TEX. CODE CRIM. PROC. ANN. art. 38.05 (Vernon 1999). To constitute reversible error in violation of article 38.05, the comment in question must be such that it is reasonably calculated to prejudice the appellant's rights by injuring him or benefitting the State. *Minor v. State*, 469 S.W.2d 579, 580 (Tex. Crim. App. 1971). However, appellant fails

to argue exactly how the court's comment violated article 38.05 by either injuring him or benefitting the State. In reviewing the relevant portion of the record, we find the following exchange:

> THE COURT: I trust he's gonna say something different from what these other two people said?
>
> MR. FRY: I think he's gonna say the same, Your Honor, what the policy was.
>
> THE COURT: If he's gonna say the same, we're wasting this jury's time at some point saying the same thing over and over again, so let's make it brief.
>
> MR. FRY: Your Honor, I'm gonna object to the Court's comment that it's a waste of time.
>
> THE COURT: Well then, if he's gonna say the same thing, he can't testify. You're excused, sir.

We conclude that the comment was not in any way reasonably calculated to benefit the State or prejudice appellant. *See Davis v. State*, 651 S.W.2d 787, 790 (Tex. Crim. App. 1983). Thus, we overrule appellant's fourth and fifth issues.

Through his sixth issue, appellant contends that the prosecutor improperly commented on appellant's failure to testify during closing argument. We disagree. The four areas of permissible jury argument are 1) summary of the evidence; 2) reasonable deduction from the evidence; 3) in response to argument of opposing counsel; and 4) pleas to law enforcement. *Long v. State*, 823 S.W.2d 259, 267 (Tex. Crim. App. 1991), *cert. denied*, 505 U.S. 1224, 112 S.Ct. 3042, 120 L.Ed.2d 910 (1992). Reversible error results

from improper jury argument only when, examined in light of the entire record, the argument is "extreme, manifestly improper, injects new and harmful facts into [the] case or violates a mandatory statutory provision." *Id. citing Hemandez v. State*, 819 S.W.2d 806, 820 (Tex. Crim. App. 1991), *cert. denied*, 504 U.S. 974, 112 S.Ct. 2944, 119 L.Ed.2d 568 (1992). An instruction to the jury to disregard an improper jury argument is generally sufficient to cure error. *Dinkins v. State*, 894 S.W.2d 330, 357 (Tex. Crim. App. 1995), *cert. denied*, 516 U.S. 832, 116 S.Ct. 106, 133 L.Ed.2d 59 (1995).

In the case before us, we must determine whether the prosecutor committed wrongdoing during closing argument when she argued the following:

> Joel Morris went and talked to the Defendant, gave him a chance to explain what happened. 'I don't know, I was busy.' Michael Turner. I asked him, 'How many customers did Nicholas Butts have between the hours of 5:00 and 7:00?' 'Three.' I asked him, 'Would you consider that busy?' 'No.' What did he say? 'it was dead time.' He's a liar. He lies. He lies.

At this time, defense counsel objected based on "a comment on defendant's failure to testify." The trial court sustained the objection, defense counsel then requested an instruction be given to the jury. The trial court complied. Finally, counsel requested a mistrial which was denied.

First, we find that the aforementioned argument pertained to the implausible explanation appellant gave his manager regarding the sales transactions. That explanation being that he was too busy when the transactions

occurred to remember them (even though appellant only waited on three customers during the two hour period). Next, the prosecutor's statement itself mentioned nothing about appellant personally failing to provide the information. Given the foregoing circumstances, and the context in which the statement was uttered, the comment can be reasonably construed that the appellant lied when he told his manager that he was too busy and could not remember the suspect transactions. In other words, it could not be reasonably interpreted as naturally and necessarily alluding to appellant's silence. This being so, it did not trigger application of the rule prohibiting comment upon an accused's silence. *See Goodson v. State*, 840 S.W.2d 469, 474 (Tex. App. – Tyler 1991, pet. ref'd) (holding that remarks by a prosecutor about a defendant's failure to produce a banker, accountant, or employer to explain his sources of income were not an improper comment on Goodson's failure to testify).

Lastly, because the comment was not improper, we cannot hold that the trial court erred in refusing to declare a mistrial when it was made.[1] In this case, the trial judge immediately instructed the jury to disregard the statement and to "consider it for no purpose whatsoever." The court's instruction was sufficient to cure any error, if indeed there was error. Thus, we overrule appellant's sixth issue

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[1] Appellant did allude to at least one other instance in which an improper comment was purportedly made. Yet, he objected to only the one that we addressed supra. Thus, any complaint regarding the other was waived. TEX.R.APP.P. 33.1; *Garcia v. State*, 887 S .W.2d 862, 877 (Tex. Crim. App. 1994), *cert. denied*, 514 U.S. 1021, 115 S.Ct. 1368, 131 L.Ed. 223 (1995).

Accordingly, we affirm the judgment of the trial court.

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION AUSTIN,
TEXAS 78711

[STAMP]

March 9, 2001
COA#: 07-00-00299-CR
RE: CASE NO. 0414-01
STYLE: BUTTS, NICHOLAS

I have this day received and filed the Appellant's petition for discretionary review.

Troy C. Bennett, Jr., Clerk

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN,
TEXAS 78711

[STAMP]

May 9, 2001
COA#: 07-00-00299-CR
RE: Case No. 0414-01
STYLE: BUTTS, NICHOLAS

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN,
TEXAS 78711

[STAMP]

May 29, 2001
COA#: 07-00-00299-CR
RE: Case No. 0414-01
STYLE: BUTTS, NICHOLAS

ON THIS DAY THE APPELLANT'S MOTION FOR REHEARING WAS FILED WITH THIS COURT.

Troy C. Bennett, Jr., Clerk

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN,
TEXAS 78711

[STAMP]

June 13, 2001
COA#: 07-00-00299-CR
RE: Case No. 0414-01
STYLE: BUTTS, NICHOLAS

On this day the Appellant's Motion for Rehearing was denied.

No. _____

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

No. 07-00-0299-CR
In the Court of Appeals for the Seventh District
Of Texas

NICHOLAS BUTTS, JR.,

Appellant

V.

THE STATE OF TEXAS,

Appellee

APPLICATION FOR DISCRETIONARY REVIEW OF THE COURT OF APPEALS, SEVENTH DISTRICT, AMARILLO DECISION IN CAUSE NO. 07-00-0299-CR

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REQUEST FOR ORAL ARGUMENT

Oral argument would be helpful in clarifying the legal and factual insufficiency argument; as well as the importance and effect of excluding the testimony of a defense witness, and of the trial judge commenting that the inclusion of that witness would be a waste of time.

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STATEMENT OF THE CASE

On April 10, 2000, Appellant Nicholas Butts, Jr. appeared for trial before the Honorable Michael R. Fields, as a defendant in Cause Number 0980483, in which the State of Texas alleged that he had committed the offense of theft of over five hundred and under one thousand five hundred dollars. (CR.R. Vol. 3, p. 5)

Following a trial by jury, Appellant was found guilty of the offense of theft. (CR.R. Vol. 3, p. 185). Having been found guilty, the court sentenced Appellant to 270 days confinement in the Harris County Jail. (CR.R. Vol. 4, p. 8).

Appellant filed a timely Notice of Appeal. (Cl.R., 41), and did not file a Motion for New Trial.

STATEMENT OF THE PROCEDURAL HISTORY

The Court of Appeals for the Seventh District of Texas affirmed Appellant's conviction in an unpublished opinion delivered on January 10, 2001. Appellant files this petition for discretionary review in the Seventh District of Texas at Amarillo within the applicable time limits.

FIRST AND SECOND GROUNDS FOR REVIEW

The evidence is legally insufficient to support a verdict that Appellant is guilty of the offense of theft.

The evidence is factually insufficient to support a verdict that Appellant is guilty of the offense of theft.

The Court of Appeals for the Seventh Judicial District of Texas committed reversible error in holding that the verdict is supported by legally sufficient evidence.

REASONS FOR REVIEW

A review of legal sufficiency requires the Court to view the evidence in the light most favorable to the verdict, and ask whether any rational trier of fact could have found beyond a reasonable doubt all of the elements

of the offense. *Santellan v. State*, 939 S.W.2d 155 (Tex.Crim.App. 1997), *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), *Barnes v. State*, 876 S.W.2d 316, 322 (Tex.Crim.App. 1994), cert. denied, 513 U.S. 861, 115 S.Ct. 174, 130 L.Ed. 2d 110 (1994).

In a review of factual sufficiency, the Court of Appeals views all evidence without the prism of 'in the light most favorable to the prosecution' . . . and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Santellan v. State, supra; Clewis v. State*, 922 S.W.2d 126, 129, (Tex. Crim. App. 1996). The factual sufficiency review process begins with the assumption that the evidence is legally sufficient under the Jackson test. *Clewis, supra* at 134. The appellate court then considers all of the evidence in the record related to appellant's sufficiency challenge, not just the evidence that supports the verdict. The appellate court reviews the evidence weighed by the jury which tends to prove the existence of the elemental fact in dispute, and compares it to the evidence which tends to disprove that fact. *Santellan, supra*, at 164. The court is authorized to disagree with the jury's determination, even if probative evidence exists which supports the verdict. *Clewis, supra*, at 133; *In Re King's Estate*, 150 Tex. 662, 244 S.W.2d 660, 661 (Tex. 1951). The appellate court maintains deference to the jury's findings, by finding fault only when "the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust." *Clewis, supra*, at 135.

The verdict here is so contrary to the great weight of the evidence presented that it is wrong and unjust.

Appellant was convicted of the offense of theft although the evidence introduced at trial indicated that he was merely doing his job according to common practice.

Appellant here was found guilty of the offense of theft. A person commits the offense of theft if he unlawfully appropriates property with intent to deprive the owner of property. Appropriation of property is unlawful if it is without the owner's effective consent. Tex.Pen.C. § 31.03.

The elements constituting an offense under § 31.03 are: a person, with intent to deprive the owner of property, unlawfully appropriates that property, without the effective consent of the owner. *Thomason v. State*, 892 S.W.2d 8, 10 (Tex.Crim.App. 1994).

The evidence introduced at trial failed to establish, beyond a reasonable doubt, that Appellant appropriated the property of Stubbs Cycles without the effective consent of the owner, because Appellant merely followed the established practice of transferring parts and accessories to a 'major unit' (motorcycle) sale, in an "internal transaction", based on the request of the salesman.

The evidence introduced at trial established that Appellant, Nicholas Butts, Jr., was employed as a salesperson at the parts counter of Stubbs Cycles, a retailer of motorcycles and motorcycle accessories in Houston, Harris County, Texas. On November 26, 1999, Butts was involved in two "internal transactions" for motorcycle accessories, including a helmet, some shields and a leather jacket. All of the items were Japanese based products, but were associated with the VIN numbers assigned

to two Harley Davidson, American made, motorcycles. (CR. R. Vol. 3, p. 20-22)

"Internal transactions" at Stubbs Cycles referred to sales of parts or accessories in conjunction with the sale of a major unit, a motorcycle, without money actually changing hands at the parts counter. (CR. R. Vol. 3, p. 30).

The internal transactions at issue here were scrutinized by the managers at Stubbs due to the association of Japanese products with the Harley Davidson motorcycles, and due to the lack of a sales manager's authorization signature on the invoice. (CR.R. Vol. 3, p. 21). According to witness, Tommy Brewer, it was unusual for Japanese accessories to be sold with a Harley Davidson, and it was the policy and procedure at the dealership to require the signature of the sales manager on internal transactions. Brewer, Japanese parts manager at Stubbs, testified that in order to accomplish an internal transaction, the salesperson was required to go to the parts counter, indicate to the parts salesperson which parts were to be included with the motorcycle sale, give the VIN number of the motorcycle to the salesperson, and have the parts person pull the needed parts or accessories, after the sales manager's signature had been obtained. (CR.R. Vol. 3, p. 43, 44).

Joel Morris, parts manager at Stubbs, testified, however, that it probably did happen that parts were billed to motorcycles without manager's approval, and that sometimes there was no authorization and parts were going to legitimate units. (CR. R. Vol. 3, p. 66, 67).

Morris also testified that although it was unusual for Japanese accessories to be associated with the sale of a

Harley Davidson, a person could use any of the items listed in the internal transactions at issue here on any bike. (CR.R. Vol. 3, p. 71).

It was determined here that the items in the transactions here were stolen because the customers who purchased the bikes referenced by VIN number in these transactions had not ordered or received the items. (CR. R. Vol. 3, p. 64). Nicholas Butts was not fired for theft however, as parts manager, Joel Morris, testified that Appellant was fired for not following the company policy requiring sales manager signature prior to release of parts to a salesperson. (CR.R. Vol. 3, p. 61).

The videotape of the transactions showed that the Appellant merely took the parts order and VIN number from a salesman, Neil McNeil, bagged the items and gave them to McNeil. (CR. R. Vol. 3, p. 104-107). Upon viewing the videotape of this transaction, witness Staci Shott, who had also worked as behind the parts counter at Stubbs, testified that Nicholas Butts had handled the transaction in a completely normal manner for a arts person. (CR.R. Vol. 3, p. 122). She further testified that, as a parts person, she would not have the sales authorized by a sales manager. (CR.R. Vol. 3, p. 122).

A former salesman at Stubbs, Scott Babbitt, testified that it was common practice for a salesman who needed a part or accessory in conjunction with the sale of motorcycle to go to the parts counter, look up a parts number, give the part number and the last six digits of the VIN number to the parts person, and the parts person would order the part or have it installed. (CR.R. Vol. 3, p. 149).

'Staci Shott also testified that there was no company policy requiring a signature before the date of the internal transactions here, and that it was a week later that the policies and procedures changed to require managers' signatures on sales attached to a major unit. (CR.R. Vol. 3, p. 128).

John Hughes, whose testimony was excluded by the trial court as being cumulative would have testified that he was familiar with all aspects of how the parts counter worked, and that almost all of the time invoices generated from the parts counter were never countersigned by a sales manager. He would have testified further, as presented to the court in an offer of proof, that when he ordered parts, he would give a six-digit VIN number and get the part, without the signature of the sales manager. (CR.R. Vol. 3, p. 183).

There was no evidence that Appellant appropriated any item from Stubbs Cycles without effective consent of the owner. Evidence introduced at trial failed to show that Butts ever received any of the items taken by Neil McNeil, or that he received any profit from them. No association between Neil McNeil and Appellant was shown, except that they worked for the same employer, and that Nicholas Butts was merely doing his job in delivering the listed accessories to salesman Neil McNeil, according to the common practice.

As there is reasonable doubt that Appellant, doing his job according to accepted practice, appropriated property from Stubbs Cycles without the effective consent of

the owner, the evidence was legally insufficient to support the jury's verdict that Nicholas Butts, Jr. was guilty of the offense of theft.

As the evidence introduced established only that Appellant completed two internal transactions for accessories without a manger's authorization, which may or may not have been required, but was not ordinarily obtained, and that he completed those transactions at the direction of a salesman, according to the common practice at Stubbs, the great weight of the evidence is contrary to the verdict of the jury.

THIRD GROUND FOR REVIEW

Calling a co-defendant witness whom the State knew would refuse to testify based on his Fifth Amendment privilege amounted to prosecutorial misconduct, and allowing the State to call the witness, after being advised that he would invoke his Fifth Amendment privilege, constitutes error on the part of the trial court.

The Court of appeals for the Seventh Judicial District of Texas committed reversible error in holding that there was no error.

REASONS FOR REVIEW

A trial court commits error in permitting the State to call a co-defendant witness to the stand and require him to claim his privilege against self-incrimination and refuse to testify in the presence of the jury. Such refusal is prejudicial because it can be used as an incriminating fact against the appellant. *Allen v. State*, 461 S.W.2d 622,

(Tex.Crim.App. 1971); *Washburn v. State*, 299 S.W.2d 706 (Tex.Crim.App. 1957). Calling such a witness and having him decline to testify, in the presence of the jury, constitutes error as it can be offered for no other purpose than to compel or invite the witness, who is then under indictment for the same offense, to refuse to testify in order to use this as an incriminating fact against the appellant. *Washburn, supra* at 708, citing *McClure v. State*, 95 Tex.Cr.R. 53, 251 S.W.2d 1099, 1102. If the State's purpose in putting the witness on the stand is to compel or invite his refusal to testify, in order to use this as an incriminating fact against appellant, the state is guilty of an injustice. *McClure*, supra.

Prior to trial, Appellant objected to the State calling co-defendant Neil McNeil to the witness stand in the presence of the jury, because Appellant's counsel had been informed that McNeil would assert his privilege against self-incrimination, and calling McNeil would be prejudicial to Appellant. (CR.R. Vol. 2, p. 5). The Court had also been informed by McNeil's Motion to Quash Subpoena that McNeil would assert his privilege against self-incrimination and refuse to testify if called. (CR.R., 20). The Court's ruling on Appellant's objection was that the objection would be addressed when they [sic] trial reached the point that McNeil would be called. (R.R. Vol. 2, p. 5).

As their final witness, in the presence of the jury, the State called Neil McNeil. Appellant approached the Bench and informed the Court against that McNeil intended to assert the privilege against self-incrimination. The Court excused the jury to see what McNeil would say. Following voir dire of McNeil, outside the presence

of the jury, in which McNeil did assert the privilege, the State decided not to question McNeil. (CR.R. Vol. 2, pp. 114-118).

After calling the jury back to the courtroom, the court commented, "Ladies and gentlemen, the State has called a witness. That witness will not be testifying." (CR.R. Vol. 2, p. 119). The court gave no instruction to disregard the fact that McNeil had been called, but would not be testifying, thus leaving the jury to draw its own conclusions.

At the time McNeil was called, the jury already knew that McNeil was involved in the transactions at issue, and that he also had been charged with theft for his part in the transactions. (CR.R. Vol. 3, p. 113).

Having been repeatedly informed by Appellant and by counsel for McNeil that McNeil would invoke his Fifth Amendment privilege, the State's calling of McNeil, in the presence of the jury, could be offered for no other purpose than to compel or invite McNeil to refuse to testify in order to use it as an incriminating fact against Appellant. The State's action was prejudicial to Appellant.

Likewise, having been repeatedly informed by Appellant and by counsel for McNeil that McNeil would invoke his Fifth Amendment privilege, the trial court committed error in permitting the State to call the witness to the stand in the presence of the jury.

FOURTH AND FIFTH GROUNDS FOR REVIEW

It was error for the trial court to exclude the testimony of a defense witness as cumulative.

The trial court erred by commenting on the weight of the evidence while ruling on the exclusion of the testimony of a defense witness.

The Court of Appeals for the Seventh Supreme Judicial District of Texas committed reversible error in holding that there was no error.

REASONS FOR REVIEW

All relevant evidence is admissible, except as otherwise provided by the Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Tex.R.Evid. 402.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. Tex.R.Evid. 403.

The trial court need not engage in a balancing test unless the opponent of the evidence objects based upon Rule 403, that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. *Mozon v. State*, 991 S.W.2d 841, 846 n.6 (Tex.Crim.App. 1999).

In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any

stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case. Tex.R.Cr.Pro. 38.05.

The standard for reviewing a trial court's evidentiary rulings is abuse of discretion. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App.1997). If the trial court has operated within the boundaries of its discretion, an appellate court may not disturb the trial court's ruling. *Montgomery v. State*, 810 S.W.2d 372, 390 (Tex.Crim.App.1990).

At the end of the first day and only day of testimony, at approximately 5:00 p.m., appellant called witness John Hughes. Without any objection from the State, the court began to question whether Hughes' testimony was going to differ from the testimony of the other two defense witnesses. When informed that this witness would testify what the policy was regarding internal transactions, the court offered the comment that the witness was a waste of time, and that he could not testify. Appellant objected to the court's comment. (CR.R. Vol. 3, p. 158).

The court then ordered the jury taken out, and proceeded to voir dire the witness, without any participation by the State, who had never raised an objection to the testimony, deciding ultimately that the witness' testimony was inadmissible because it would be cumulative, and because the jury's time was being unnecessarily monopolized. (CR.R. Vol. 3, p. 161)

Later, while the jury was deliberating, Appellant made a Bill of Exception regarding the testimony of Hughes. Appellant proffered that John Hughes would have testified that he was familiar with the way the parts counter worked, due to this two years of experience of

installing accessories on new bikes, and that the invoice generated from the parts counter almost all the time was never countersigned by a manager, as the managers' had testified. He would have testified further that when he ordered parts, he would give the parts counter the VIN number and that he would get the part and install it, and that he saw the invoices and they were not countersigned. (CR.R. Vol. 3, p. 183).

The court remained of the opinion that the information was cumulative, and that it had been testified to over and over and over again, and to allow the cumulative testimony at that time of the day, or at any hour of the day, would have amounted to nothing more than a waste of the jury's time, which the rules say the court is supposed to prevent. (CR.R. Vol. 3, p. 184).

The court's *sua sponte* exclusion of the testimony of John Hughes deprived Appellant of his right to present witnesses on his behalf as guaranteed by the Sixth Amendment to the United States Constitution, Article I, Section 10 of the Texas Constitution, and Article 1.05 of the Texas Code of Criminal Procedure. As a Stubbs employee who ordered parts from the parts counter by way of internal transactions, and installed the parts on major units, Hughes would have been able to present testimony as a two year employee knowledgeable of the practices of the parts counter, from a different perspective than Staci Shott, a parts person, or Scott Babbitt, a salesman at Stubbs. Considering that Appellant had to overcome the testimony of three managers from Stubbs which differed considerably from the testimony of Shott and Babbitt, who were relatively short time employees of

Stubbs, the Court erred in excluding one third of Appellant's witnesses, merely because it was 5:00 p.m., especially after Appellant advised the Court that Hughes' testimony would take a fairly short time. (CR.R. Vol. 3, p. 158).

Furthermore, the court compounded the error by commenting, before the jury, that Hughes testimony would be a waste of time, violating the admonition of § 38.05 of the Texas Code of Criminal Procedure against commenting on the weight of the evidence.

SIXTH GROUND FOR REVIEW

It was error for the prosecutor to comment on the defendant's failure to testify during her closing argument.

The Court of Appeals for the Seventh Supreme Judicial District of Texas committed reversible error in holding that the court's instruction was sufficient to cure any error.

REASONS FOR REVIEW

The failure of a defendant to testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause. Tex.Code Crim.Pro., Article 38.08.

In order to violate the right against self-incrimination or Article 38.08, the language, when viewed from the jury's standpoint, must be manifestly intended or of such a character that the jury would necessarily and naturally take it as a comment on the accused's failure to testify.

While a mere indirect or implied allusion to the accused's failure to testify does not violate appellant's rights, a remark that calls attention to the absence of evidence that only the defendant could supply will result in a reversal. *Patrick v. State*, 906 S.W.2d 481, (Tex.Crim.App. 1995); *Banks v. State*, 643 S.W.2d 129, 134-35 (Tex.Crim.App. 1982), cert. denied, 464 U.S. 904, 104 S.Ct. 259, 78 L. Ed.2d 244.

Appellant chose not to testify in this trial. During the State's closing argument, the prosecutor made remarks which repeatedly commented on Appellant's failure to testify. She pointed to Appellant's failure to be able to explain the situation to Joel Morris, and commented that Appellant was a liar, stating "He lies. He lies." Following those remarks, Appellant objected that the prosecutor was commenting on the Appellant's failure to testify and the court sustained the objection, instructing the jury to disregard the last statement. After the instruction was given, Appellant moved for a mistrial, and the court overruled the motion. (CR.R. Vol. 3, p. 179)

The prosecutor proceeded to comment, however, asking "Whose name was on the invoice? Nicholas Butts. Who's given a chance by his manager, Joel Morris, to explain what happened? Nicholas Butts. He chose not." (CR.R. Vol. 3, p. 180).

The prosecutor's closing argument was manifestly intended and of such a character that the jury would necessarily and naturally take it as a comment on the accused's failure to testify, and requires that Appellant's conviction be reversed.

PRAYER FOR RELIEF

Appellants prays that this Honorable Court grant this petition and Order that this case be reversed and remanded for a new trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Petition for Discretionary Review was forwarded to the Attorney for the State on this the 8th day of February, 2001.

LINDA G. CRYER

APPENDIX

[Appendix Omitted In Printing]

NO. 0414-01

IN THE COURT OF CRIMINAL APPEALS AT AUSTIN, TEXAS

No. 07-00-0299-CR

IN THE COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

NICHOLAS BUTTS, JR.
Appellant

v.

THE STATE OF TEXAS,
Appellee

MOTION FOR REHEARING OF APPELLANT'S APPLICATION FOR DISCRETIONARY REVIEW OF THE COURT OF APPEALS, SEVENTH DISTRICT, AMARILLO DECISION IN CAUSE NO. 07-00-0299-CR

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ATTORNEY FOR APPELLANT

STATEMENT OF THE PROCEDURAL HISTORY

The Court of Appeals for the Seventh District of Texas affirmed Appellant's conviction in an unpublished opinion delivered on January 10, 2001. The Court of Criminal Appeals refused Appellant's Application for

Discretionary Review on May 9, 2001. Appellant files this Motion for Rehearing within applicable time limits.

MOTION FOR REHEARING

Appellant, Nicholas Butts, Jr., renews his original application for discretionary review as attached, and urges the Court to consider these supplemental reasons for review.

FIRST SUPPLEMENTAL REASON FOR REVIEW

The Court of Appeals erred in failing to find that the trial court abused its discretion by failing to prohibit the State from calling a witness in the presence of the jury, when the court was advised that the witness intended to exercise his Fifth Amendment privilege.

As indicated in the Court of Appeals decision, "During a pre-trial hearing, defense counsel made the following objection: 'I object to the prosecutor's calling [the codefendant] as a witness in front of the jury. Her calling a . . . co-defendant who will take the Fifth amendment is . . . a comment on . . . the co-defendant's Fifth amendment right, which is improper.' The court agreed but further stated that it could not control the State's decision to call witnesses and it had no knowledge of whether or not the co-defendant would testify."

The trial court's comment that it could not control the State's decision to call witnesses is contrary to the admonition contained in Texas Rule of Evidence 513(b), which indicates that in jury cases, the proceedings shall be conducted, to the extend practicable, so as to facilitate the

making of claims of privilege without the knowledge of the jury. TRE 513(b).

In failing to prohibit the State from calling the co-defendant witness in the presence of the jury, and in failing to determine that the witness would exercise his Fifth Amendment right before the witness was called in front of the jury, the trial court abused his discretion. The Court of Appeals erred in failing to find that the trial court abused its discretion by failing to prohibit the State from calling a witness in the presence of the jury, when the court was advised that the witness intended to exercise his Fifth Amendment privilege.

SECOND SUPPLEMENTAL REASON FOR REVIEW

The Court of Appeals erred in its failure to find that the evidence was legally and factually insufficient to support Appellant's conviction.

Although the Court of Appeals found that the verdict was supported by legally and factually sufficient evidence, it admitted that the evidence was not free of contradiction. The Court of Appeals pointed to the testimony of two prior employees of Stubbs who testified about the policies and procedures, or lack thereof, implemented by Stubbs. Staci Shott testified that she was a parts sales person, like Appellant, and that she rarely received manager's approval or obtained a manager's initials on merchandise invoices, and that there was no procedure in place regarding this matter until after the incident which formed the basis of the allegations against Appellant. Another ex-employee, Scott Babbitt, testified that he was a motorcycle sales person at the time the

incident occurred. He testified that, because of the competitive nature of motorcycle sales at Stubbs, motorcycle sales persons at Stubbs would generally follow through with a sale until its completion, even if this meant going to the parts counter and obtaining additional merchandise that had been requested by the customer. Babbitt opined that the fact that MacNeill waited on the bagged merchandise was not so strange because the motorcycle sales personnel had to protect their customers or another sales person would take them away.

Even viewing the evidence in the light most favorable to the verdict, the testimony of the two employees, coupled with other testimony referred to in Appellant's original application, provided reasonable doubt that Appellant was guilty of the offense with which he was charged. All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. Tex.Pen.C. § 2.01.

Due to the contradictory evidence, recognized by the Court of Appeals, and other evidence referred to in Appellant's original application, no rational trier of fact could have found beyond a reasonable doubt all of the elements of the offense. As the verdict was clearly erroneous and manifestly unjust, the Court of Appeals erred in its finding that the evidence was legally and factually sufficient to support the verdict.

The Court of Criminal Appeals should grant discretionary review in order to exercise its powers of supervision.

PRAYER FOR RELIEF

Appellant prays that this Honorable Court grant his Motion for Rehearing and Order that this case be reversed and remanded for a new trial.

Respectfully submitted,

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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Motion for Rehearing was forwarded to the Attorney for the State on this the 24th day of May, 2001.

/s/ Linda G. Cryer
Linda G. Cryer

I hereby certify that this Motion For Rehearing is grounded on substantial intervening circumstances specified in the Motion and that this said Motion is made in good faith and not for delay.

/s/ Linda G. Cryer
Linda G. Cryer